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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 743

GEORGE LEVINE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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COMES NOW GEORGE LEVINE, petitioner herein, by and through his undersigned attorneys, and respectfully prays this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 13th day of July, 1964, and the order of the same Court denying rehearing entered on the 2nd day of November, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is found in Appendix A. hereof and the advice to

counsel as to the order denying rehearing is found in Appendix B. hereof.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of Rule 37 (b)(1)(2) of the Federal Rules of Criminal Procedure. The United States Court of Appeals for the Fifth Circuit rendered its opinion in this cause on the 13th day of July, 1964, (Appendix A.), and thereafter a petition for rehearing was timely filed (Appendix C.), and thereafter the said Court entered its order denying rehearing without opinion (Appendix C.).

QUESTIONS PRESENTED

I

Whether or not the trial court committed reversible error in denying the appellants' motions for judgment of acquittal on both counts where the evidence was insufficient to prove the allegations in the indictment.

II

Whether or not the trial court committed reversible error in admitting into evidence declarations of co-defendant Orin F. Rogers that were not uttered in furtherance of the conspiracy.

III

Whether or not the trial court, after expressing a doubt as to the sufficiency of the proof of knowledge

of the petitioner, George Levine, as to whether or not, as in this case, the bonds in question were counterfeit and transported in violation of Federal law, and being informed prior to the case going to the jury that the petitioner, George Levine, had been convicted in another case (which statement was made in open court but not recorded as set forth in the affidavit in the petition for rehearing (Appendix C.) attached hereto) and then declining said petitioner's motion for judgment of acquittal by stating "I say that you have a very strong defense and almost a law defense, but not quite, in my opinion", and then overruling motion for directed judgments of acquittal, committed reversible error by not resolving his doubt in favor of the petitioner, George Levine, and whether or not under those circumstances he could then give the defendant a fair and impartial trial as guaranteed him by the Constitution of the United States.

STATUTES AND RULES INVOLVED

United States Constitution, Fifth Amendment; Title 18 United States Code Annotated, Section 2314; Title 18 United States Code Annotated, Section 371; and Title 28 United States Code Annotated, Section 753, paragraph (b). Text of same are set forth in Appendix G. hereof.

STATEMENT OF THE CASE

Your petitioner, George Levine, and one Orin F. Rogers were charged by an indictment rendered by the Grand Jury at Miami, Florida, in the United States District Court for the Southern District of Florida charging the petitioner and said Rogers with transporting in foreign commerce counterfeited securities in violation of Title 18 United States Code, Section 2314.

The appellants were also charged in the same indictment with conspiring to commit the offense of transporting counterfeited securities in violation of Title 18, United States Code Annotated, Section 371.

That thereafter a jury trial was had and evidence was presented to the jury, a more complete and thorough statement of the evidence presented to the jury is contained herein in Appendix D. Your petitioner was found guilty on both counts in the indictment and after adjudication of guilty by the Court, your petitioner was sentenced to ten years imprisonment, five years on each count consecutively.

In a normal manner the cause came on for oral argument before the United States Court of Appeals and thereafter the opinion of the Court (Appendix A.) was entered on the 13th day of July, 1964, and that thereafter a petition for rehearing was timely filed and subsequently the Court of Appeals entered its order denying rehearing without opinion (Appendix B.).

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the writ sought by your petitioner should be granted for the reason that the decision of the Fifth Circuit of **Fowler v. United States,** 310 F. 2d 66, is in direct conflict with the order of the Fifth Circuit in the case at bar in denying petitioner's petition for rehearing without opinion (Appendix B., Appendix C.).

In support of this it is respectfully urged that in said petition for rehearing matters were raised that were

not included in the record and not recorded by the reporter, contra to the ruling in the **Fowler** case (supra).

It is suggested that inasmuch as the Fifth Circuit Court of Appeals ignored the point raised in the petition for rehearing and the affidavit attached thereto, that the Fifth Circuit deemed the matters set forth therein, although uncontradicted and not refuted by the Government, was harmless error. It is suggested that the matters and things stated in said petition for rehearing are not harmless error, and it is respectfully submitted that this Court consider this point very carefully inasmuch as the affidavit in support of the petition for rehearing states facts, and I quote

> ". . . that at the close of the government's evidence and at the close of the case they asked the Court to direct a judgment of acquittal on behalf of the Appellants. After some argument to the Court by the undersigned counsel, the Court then said 'I would like to hear from the government, and the record on Page 297 recites 'thereupon counsel for the respective parties argued to the Court', that to their best knowledge and belief after considerable argument the Court said, in substance, 'I am inclined to go along with the defense' and then asked Mr. Paisley, counsel for the government, what he had to say; Mr. Paisley, in addition to other argument, said to the Court, in substance, at that time, that the Appellant, LEVINE, had been sentenced to 12½ years in the penitentiary in Orlando on a case that took over 30 days to try and in the event the Court sustained a mo-

> tion for judgment of acquittal and the Orlando case was reversed the Appellant, LEVINE, would go scot-free.",

that would prevent any Court from giving a fair and impartial decision on the point that was raised and not recorded. The affidavit further goes on to state as follows:

> "That thereafter the Court went back on the record and stated 'I am going to over rule your motion, I see you have a very strong defense and almost a law defense but not quite in my opinion (T-297).",

which statement by the Court evidences an influence brought upon him by the statement by Government counsel that to this date has not been contradicted or refuted. That the affidavit attached to the petition for rehearing (Appendix C.) was signed and sworn to by members of this Court and the trial counsel for the petitioner.

It is respectfully submitted that the statements contained therein evidence a doubt in the trial court's mind, and it is the opinion of your petitioner by and through his counsel that this doubt would have been resolved in favor of your petitioner but for the statement that was made by Government counsel. That the statement contained therein and not contradicted or refuted by the Government was highly prejudicial and in the opinion of your petitioner and his counsel, deprived your petitioner of a fair and impartial hearing and deprived him of his Constitutional right of due process.

It is further respectfully submitted that the Fifth Circuit erred in its opinion (Appendix A.) in deciding the points more fully raised in your petitioner's brief attached hereto and made a part of the petition for writ of certiorari as Appendix D.

It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit did err in the entry of the opinion herein and in the order denying the petition for rehearing herein without opinion, and that the writ herein sought should be issued and the decision of the Fifth Circuit of the United States Court of Appeals be reversed.

Respectfully submitted,

NICHOLAS J. CAPUANO of
LURIE & CAPUANO
1409 Biscayne Building
Miami, Florida 33130
Attorneys for Petitioner

By _____

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing was this 4th day of December, 1964, mailed to the SOLICITOR GENERAL, Department of Justice, Washington, D.C.

_____
NICHOLAS J. CAPUANO

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20495

ORIN F. ROGERS and GEORGE LEVINE,

Appellee.

versus

UNITED STATES OF AMERICA,

Appellant.

Appeals from the United States District Court for the Southern District of Florida.

(July 13, 1964).

Before TUTTLE, Chief Judge, BROWN, Circuit Judge, and

BREWSTER, District Judge.

TUTTLE, Chief Judge: This is an appeal from a conviction of the appellants for transporting 191 counter-

feit Shell Union Oil Company $1,000 debentures from Miami, Florida, to Nassau in the Bahamas with knowledge that they were counterfeited, in violation of 18 U.S.C.A. §2314, and of conspiring to transport such documents in violation of §371. Appellants here rely pricipally on their contention that there was insufficient evidence because of the failure by the United States to prove (a) that either of the defendants transported the securities from Miami to Nassau, and (b) that either of them had knowledge that the debentures were counterfeited. The sufficiency of the evidence was preserved by motions by appellants for judgment of acquittal at the end of the Government's case.

The indictment alleged that the date of the substantive crime was December 28, 1960. There was ample evidence from which the jury could have found the following facts:

During the crucial period, George Levine lived in Miami and Orin F. Rogers in Nassau. Rogers was manager of Guarantee Trust Co. in Nassau. In the latter part of December, 1960, Rogers in Nassau received a long distance call from Levine. After the call Rogers remarked to his secretary: "I have to go over to Miami to get something. George didn't want to bring it into the Colony." Rogers' secretary's recollection was that he then went to Miami and returned the following day. Rogers was a passenger aboard an evening flight No. 445, of Bahamas Airways, from Nassau to Miami on December 28, 1960. Rogers made a customs declaration at the Miami Airport Customs office on December 28, 1960. Bahamas Airways passenger list for its evening flight No. 446 from Miami to Nassau on December 28,

1960, showed that a "Rogers, O. F." and a "Levine, G." were aboard. That flight left an hour after Rogers had arrived in Miami. Customs records in the Miami airport completed by a "Orin F. Rogers" and a "George Levine" on their return to Miami on December 30, 1960, showed that they had left the country on December 28, 1960.

When Rogers returned to his office following the December 28, 1960 trip to Miami he had a "brown paper kind of package inside of (a) zipped portfolio," which, according to his secretary, contained papers looking like "insurance policies or something of that nature" with green or gold edges. Rogers told his secretary at that time that "George had been unduly worried, because when he came through Customs, whatever package that he had that was in his hand they didn't even bother to look . . . When the package was brought through Customs, nobody bothered to look." Rogers' secretary saw Levine in Rogers' office in the latter part of December, 1960.

On December 29, 1960, Rogers called Mr. Henderson, a salesman with Ross & Co., Ltd., a securities brokerage firm in Nassau, to come to Rogers' office. Rogers said that he and Levine wanted to discuss opening a marginal account with Ross & Co., Ltd. and to deposit some bonds with them against which they could borrow. On that date, Henderson did talk to Rogers and Levine at Rogers' office, where he was shown some bonds. They were wrapped in brown paper. The opening of the marginal account and the depositing of the bonds was discussed between the three of them. Henderson told Rogers and Levine that Ross & Co., Ltd. could handle the matter. On December 30, 1960, Henderson again met

with Rogers and Levine. They completed a Ross & Co., Ltd. authorization form and delivered the bonds to him. Henderson gave them a receipt made out to them jointly. During the course of the dealings between Henderson on the one hand and Rogers and Levine on the other, they told him they were acting as co-agents for a principal in Miami. They said they had brought the securities to the United States from Cuba.

The counterfeit Shell Oil Company debentures had a face value of $191,000.00. If they had been genuine, their market value at the time involved would have been $168,000.00. Using the bonds as collateral, Ross & Co., Ltd. credited the defendants' marginal account with approximately $116,000.00. During the discussion about opening the marginal account, the defendants asked Henderson whether they would be able to withdraw cash from the account, and they were told that they would be able to do so. When the bonds were given to Henderson, appellants requested initially to withdraw $80,000.00 and to be allowed subsequently to withdraw $20,000.00. On January 3, 1961, Levine inquired of Henderson whether he could get the first check, and was informed that it was not possible because Ross & Co., Ltd. had not then been notified that the bonds had been received in Canada, where the home office of Ross & Co., Ltd. was located. On the following day, defendants again requested the money and were given a check for $80,000.00 payable to the order of both of them jointly. They immediately cashed the check at the local bank. One week later, at Levine's request, Henderson delivered to the defendants a check for $20,000.00, which they immediately cashed. The defendants purchased securities with the balance on

their marginal account but Rogers & Co., Ltd. retained possession of the stock certificates.

Henderson never again saw Levine. Rogers terminated his employment with Guarantee Trust Company in January, 1961, and left Nassau. The debentures were counterfeit. The loss of Ross & Co., Ltd. was approximately $100,000.00. The last time Rogers saw his secretary was after he had terminated his employment with the Gurantee Trust Company, and he told her that if the FBI came by and asked her any questions, it would be better if she said nothing. Rogers' written statement made to the FBI admitted his connection with Levine and the bonds, but was exculpatory in that he denied knowledge of the counterfeit nature of the bonds. There was nothing in the statement to indicate that he had any connection with taking them from Miami to Nassau.

It is clear from the foregoing recitation of facts that there was ample evidence from which the jury could find that the bonds were transported by the appellants and that they had knowledge that they were counterfeited. The facts surrounding their opening of the brokerage account and the withdrawal of the sum of $100,000.00 in cash as soon as the funds were released at a time when the bonds, if genuine, had a market value of $168,000.00 when taken in connection with their possession of this large amount of couterfeit bonds, together with the statements made by Rogers to his secretary, build a strong circumstantial case against the appellants. See **Barfield v. United States**, 5th Cir., 229 F. 2d 936; **Najjar v. United States**, 5th Cir., 152 F. 2d 964, and **Herman v. United States**, 5th Cir., 289 F. 2d 362, **cert. denied** 368 U.S. 897.

Appellants also argue that the district court improperly admitted testimony by Rogers' secretary regarding remarks made to her by Rogers. The complaint is not that they were not admissible as against Rogers since, of course, they were in the nature of admissions by him, but they argue that they were not admissible as against Levine since, so they contend, the statements were not made in furtherance of the conspiracy.

As to the statement "I have to go over to Miami to get something. George didn't want to bring it into the Colony", we conclude that this is admissible as an exception to the hearsay rule because it is a statement of Rogers' intention and part of the **res gestae**, giving meaning to his trip to Miami and back. See **Mutual Life Ins. Co. v. Hillmon**, 145 U.S. 285. As to the second statement, we do not need to decide whether, if proper objection had been made thereto, this statement would have been admissible under the more recent holdings that permit a statement by one conspirator to be received as against another if made during the pendency of the conspiracy and where there is independent evidence of the existence of the conspiracy, and of the objecting party's participation in it. See **Carbo v. United States**, 9th Cir., 314 F. 2d 718, **cert. denied**, June 2, 1964, . . . U.S. . . ., because it is clear that no proper objection was made to the reception of this testimony by the secretary relating what Rogers had stated to her.

We conclude that the trial court was not in error in submitting the case to the jury, and that no error was committed by it in not excluding the challenged testimony.

The judgments are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

Edward W. Wadsworth
Clerk

Room 408 - 400 Royal St.
New Orleans, La. 70130

November 2, 1964

Re: No. 20495 - Orin F. Rogers and
George Levine -vs-
United States of America.

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

/s/ Edward W. Wadsworth
EDWARD W. WADSWORTH,
Clerk

Mr. Joseph P. Manners
Attorney at Law
Miami 32, Florida

Mr. Donald E. Stone
Assistant U. S. Attorney
Miami 1, Florida

Mr. Stuart R. Pollack
Attorney, Criminal Division
Washington, D. C.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
No. 20495

ORIN F. ROGERS and GEORGE LEVINE,

Appellants,

-vs-

UNITED STATES OF AMERICA,

Appellee.

Appeal From The United States District Court For The Southern District Of Florida.

PETITION FOR REHEARING

The appellants respectfully petition this court for rehearing of the appeal herein on the following grounds:

The appellants respectfully suggest that the United States Court of Appeals, Fifth Circuit, erred in its judgment in that it failed to consider several aspects of the appellants brief in support of POINT I in arriving at its opinion, which is as follows:

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR DENYING APPELLANTS MOTIONS FOR JUDGMENT OF ACQUITTAL ON BOTH COUNTS WHERE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ALLEGATIONS IN THE INDICTMENT."

The appellants would like to point out that in their brief under POINT I, argument is divided as to TRANSPORTATION and KNOWLEDGE.

Under the argument headed TRANSPORTATION the appellants suggest to the court that transportation of the bonds as alleged from Miami to Nassau is a material issue in the indictment and failure to prove the same beyond a reasonable doubt is fatal. Consequently, it was incumbent upon the government to prove beyond a reasonable doubt that the bonds were transported by the appellants or caused to be transported by the appellants from Miami to Nassau.

In reading the record counsel for the appellants finds no direct evidence stating that the bonds in evidence were those alleged to have been transported from Miami to Nassau.

The court in its charge (T-330) stated that there was no agreement that the bonds in evidence were the ones transported from Miami to Nassau. The circumstantial evidence pertaining to that question is weak and practically nil, certainly not strong enough to sustain a conviction.

Further, the appellants suggest with reference to

transportation and the proof thereof, the appellants in their brief point out that the Bill of Particulars filed in this cause by the government, stated that the transportation from Miami to Nassau took place on the 28th day of December, 1960. Therefore, the government was limited to that date in its proof of transportation. However, the court permitted the government, through the witness Adams, to introduce a passenger list dated December 29, 1960, upon the mere statement that "it was a clerical error" (T-274). The trial court accepted this explanation and allowed the document in evidence (government's exhibit #17).

Notwithstanding the fact that the evidence clearly shows that the witness Adams (T-260-277), throughout his testimony and through whom the exhibit was introduced, had nothing to do with the preparation thereof, appellants feel that to allow the exhibit supra to be used against them was a violation of their constitutional right to a fair and impartial trial when the trial court, based upon the evidence outlined herein stated (T-274) "it was a pure clerical error." In reading the testimony of the witness Adams further, there were numerous errors in the document introduced into evidence as exhibit #17 for the government, that he proclaimed willy nilly to be clerical errors.

The appellants further suggest as to KNOWLEDGE "this Honorable Court failed to consider the tenor of the trial court with reference to this point."

The court stated, after motions for judgment of acquittal was made, as follows: "what I am interested in is there any proof here about knowledge of the for-

gery" (T-296), after which statement counsel for the appellants stated his views into the record. Then the court said "I would like to hear from the government" (T-297). Then a discussion was held and argument made that was not recorded.

The appellants attach hereto an affidavit signed by counsel for the appellants, who were present at the trial of this cause before the Honorable Emett C. Choate, which relates, in substance, some of the discussion before the court, off the record. Said affidavit states that the court made the observation that he was inclined to go along with the motion of acquittal of the defendants and that thereupon, Mr. Paisley, counsel for the government, stated to the court that the appellant Levine had been sentenced to 12½ years in Orlando, and if the motion were granted, and the Orlando case reversed, Levine would go scot-free. The court then went back on the record and stated "I am going to overrule your motion. I say that you have a very strong defense and almost a law defense in my opinion, but not quite, in my opinion." (T-297).

The appellants suggest that this last expression by the court at the end of all the evidence exhibits a doubt in the court's mind as to whether or not the government had proven its case beyond a reasonable doubt and it is academic that at the end of all the evidence if the court has any reasonable doubt it should be resolved in favor of the defendant and the motion for judgment of acquittal should have been granted.

The appellants further suggest that an important phase in this case was not recorded by the official court

reporter namely, the matters and things contained in the affidavit, and the matters and things stated before the court off the record on Page 297 of the transcript herein.

Title 28 of the United States Code Annotated, Section 753, paragraph (b) states:

> "One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court".

This Honorable Court in construing the section supra stated in the case of **Fowler** v. **United States**, C.A. Fla. 1962, 310 F. 2d 66:

> "The requirement that the court reporter record all proceedings in Federal criminal cases had in open court is mandatory." **Stevens v. United States**, C.A. Tex. 1961, 289 F. 2d 308, following.

The record specifically states that after the court stated on Page 297 of the transcript "I would like to hear from the government" the record specifically states a discussion was held and an argument made and then the court went back on the record and made a further statement which has already been pointed out in the previous paragraphs of this brief. This court can observe from the affidavit attached hereto and made a part of this petition for rehearing, that the omission of the

argument to the court outside of the record that was not transcribed but had in open court (T-297), is of great importance to the appellants in this cause and if it had been transcribed in toto this Honorable Court may have rendered an opinion in favor of the appellants.

Wherefore the appellants respectfully request this court to grant the appellants petition for rehearing in this cause.

Respectfully Submitted,

MANNERS and AMOON
Attorneys for Appellants
25 West Flagler Street
Suite 406
Miami, Florida 33130

By /s/ Joseph P. Manners

JOS. P. MANNERS

STATE OF FLORIDA)
ss
COUNTY OF DADE)

JOS. P. MANNERS, being first duly sworn, deposes and says: That he is of counsel for the appellants in the above entitled cause and that he has this 28 day of July, 1964, mailed a true copy of the foregoing Petition for Rehearing to the following: WILLIAM A. MEADOWS, United States District Attorney, Federal Building, Miami, Florida, and he further states that this petition is presented in good faith and not for the purpose of delay.

/s/ Jos. P. Manners

Sworn to and subscribed
before me this 28 day
of July, 1964.

/s/ Loraine A. Gilder

Notary Public, State of Florida

My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires Aug. 30, 1966
Bonded by American Surety Co. of N.Y.

(SEAL)

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 20495

AFFIDAVIT

ORIN F. ROGERS and
GEORGE LEVINE,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.
STATE OF FLORIDA)
COUNTY OF DADE)

The undersigned, JOSEPH P. MANNERS and LEONARD McMILLEN, being first duly sworn, depose and state that they were counsel for the Appellants herein at the trial of the cause before the Honorable EMETT C. CHOATE; that at the close of the government's evidence and at the close of the case they asked the Court to direct a judgment of acquittal on behalf of the Appellants. After some argument to the Court by the undersigned counsel, the Court then said "I would like to hear from the government, and the record on Page 297 recites "thereupon counsel for the respective parties argued to the Court", that to their best knowledge and belief after considerable argument the Court said, in substance, "I am inclined to go along with the defense" and then asked Mr. Paisley, counsel for the government, what he had to say; Mr. Paisley, in addition to other argument, said to the Court, in substance, at that time, that the Appellant, LEVINE, had been sentenced to 12-½ years in the penitentiary in Orlando on a case that took over 30 days to try and in the event the Court sustained a motion for judgment of acquittal and the Orlando case was reversed the Appellant, LEVINE, would go scot-free.

That thereafter the Court went back on the record and stated "I am going to over rule your motion, I see you have a very strong defense and almost a law defense but not quite in my opinion (T-297).

FURTHER AFFIANTS SAYETH NOT.

/s/ Joseph P. Manners (Seal)

Joseph P. Manners

/s/ Leonard McMillen (Seal)

Leonard McMillen

Sworn to and subscribed before me this 24 day of July, 1964.

/s/ Gladys Hickey

Notary Public, State of Florida, at Large
My commission expires:

Notary Public, State of Florida, at Large
My Commission Expires June 11, 1965
Bonded by American Surety Co. of N.Y.
(SEAL)

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

ORIN F. ROGERS and GEORGE LEVINE,

Appellants,

-vs-

UNITED STATES OF AMERICA

Appellee.

Appeal From The United States District Court For The Southern District Of Florida.

BRIEF OF THE APPELLANTS

MANNERS AND AMOON

By: JOS. P. MANNERS
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24 West Flagler Street
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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

ORIN F. ROGERS and GEORGE LEVINE,

Appellants,

-vs-

UNITED STATES OF AMERICA

Appellee.

Appeal From The United States District Court
For The Southern District Of Florida.

BRIEF OF APPELLANTS

STATEMENT OF THE CASE AND FACTS

This appeal is to review the adjudications of guilty and sentences entered by the United States District Court for the Southern District of Florida.

Reference to the transcript of testimony will be by the use of the symbol "T".

The Appellants, GEORGE LEVINE and ORIN F. ROGERS were charged, by indictment, with transporting in foreign commerce counterfeited securities in violation of Title 18, United States Code, Section 2314.

Appellants were also charged in the same indictment with conspiring to commit the offense of transporting counterfeited securities in violation of Title 18, United States Code, Section 371.

A jury trial was had and Appellants were found guilty of both counts in the indictment. After adjudications of guilty by the Court, both Appellants were sentenced to ten years imprisonment.

The specifics of Count One of the indictment were that on or about December 28, 1960, Appellants did, with unlawful and fraudulent intent, unlawfully and willfully transport in foreign commerce from Miami International Airport in Dade County, Florida, to the City of Nassau, New Providence Island, Bahama Islands, counterfeited securities (Shell Union Oil Company Bonds), and that the Appellants knew the bonds had been counterfeited.

The specifics of Count Two of the indictment were that from on or about December 17, 1960, up to and including January 30, 1961, at Miami, Florida, the Appellants unlawfully, willfully and knowingly conspired to commit the offense of transporting in foreign commerce counterfeited securities, and in furtherance of the aforesaid conspiracy, the Appellants performed the following overt acts:

1. On or about December 28, 1960, George Levine made a telephone call to Orin F. Rogers who was then in Nassau, New Providence Island, Bahama Islands.

2. On or about December 28, 1960, Orin F. Rogers did travel by air from Nassau, New Providence Island, Bahama Islands, to Miami International Airport, Dade County, Florida.

3. On or about December 28, 1960, Orin F. Rogers did board an airplane and travel by air from Miami International Airport, Dade County, Florida, to Nassau, New Providence Island, Bahama Islands.

4. On or about December 28, 1960, George Levine did board an airplane and travel by air from Miami International Airport to Nassau, New Providence Island, Bahama Islands.

The bill of particulars pinpointed the transportation to have taken place on December 28, 1960 on Flights Nos. 445 and 446. The following is illustrative of what the Government was able to produce as evidence during the course of the trial.

The Government's first witness was Donald Charles Kaye, an airline employee who was asked to produce the passenger manifests for December 28, 1960 of Flight No. 445, Nassau to Miami, and Flight No. 446, Miami to Nassau. Mr. Kaye stated that he did not have the passenger manifests for December 28, 1960 (T. 5).

Next, the Government through a customs agent produced a baggage declaration dated December 28, 1960, indicating that an Orin Rogers entered this country on

that date and in accordance with its laws, filed a baggage declaration with the United States Customs Service.

Mr. Henderson, the Government's next witness, stated that he saw the Appellants in Nassau on December 29, 1960. He further testified that he gave a receipt for some Shell Union Oil Company bonds to Appellant, ORIN F. ROGERS, (T. 42) on December 30, 1960. The typewritten receipt was made out to "Orin F. Rogers", but the words "and George Levine" were added in ink by Mr. Henderson (T. 51). None of the bonds were identified by number on the receipt (T. 98).

The Court then inquired of Mr. Henderson, if the Appellants told him "how the bonds got to Nassau." The witness admitted that no declaration was made by Appellants as to how the bonds got to Nassau (T. 66).

Mr. Henderson continued testifying and told the Court that Appellants received a check for the bonds with the notation on the check "certified by phone" 4-1-61 (T. 85). The introduction of the check was objected to by counsel, as being immaterial and prejudicial but the Court overruled the objection (T. 86).

On cross-examination, Mr. Henderson again testified that Appellants never told him there was any transportation of the bonds from Miami to Nassau (T. 130).

Following Mr. Henderson's testimony, the Government called Valderie Courtney, who was a secretary in the same business establishment as Appellant, ORIN F. ROGERS (T. 151). She testified that she saw Appellant, GEORGE LEVINE, at her place of business around

Christmas, "either directly after or before" and that Appellant was not carrying anything with him (T. 158, 159). Miss Courtney then stated that she knew of a telephone conversation between the Appellants (T. 160). She stated: "It was George Levine because I had taken the call when Mr. Rogers wasn't in the office." (T. 160). Miss Courtney never stated that she answered the telephone at the time Appellant, Rogers allegedly talked to Appellant, Levine, nor did she identify the date and time of the call or the place from where the call originated. Miss Courtney then testified that Appellant, ORIN F. ROGERS, said 'I have to go over to Miami to get something. George didn't want to bring it into the Colony.'" (T. 161).

After a Nassau police officer testified the Government then called one, Leon I. Ross as a witness. Mr. Ross, a stock broker, who took the allegedly transported counterfeit bonds from the Appellants, testified there was no reason to doubt the authenticity of the bonds, and he presumed them to be bona fide (T. 219, 220).

The Government's final witness was Ralph S. Adams, who worked for British West Indian Airways at Miami International Airport (T. 260). He produced certain passenger manifests which were neither prepared nor received by him (T. 267, 279).

Objection to the introduction of the passenger manifests was made by Appellants' counsel on the ground that the proper predicate was not established for their introduction (T. 270). Notwithstanding the objection, the passenger manifests were admitted into evidence by the Court (T. 272). The passenger list for Flight No. 445, Nassau to Miami on which the name "Rogers, O. M." ap-

peared had two dates on it; namely December 28, 1960 and December 29, 1960. Again counsel objected to the document, but the trial judge resolved any conflict by stating "it is a pure clerical error" (T. 273).

Mr. Adams was then asked what appeared on the passenger list for Flight No. 446, Miami to Nassau (T. 274). Then the Government attorney commenced testifying that on the second page of the passenger manifest appears the name "Rogers, O." and "Levine, G." (T. 275). The Government's attorney then asked the following question: "And that is the sheet that you say the clerical error was on (this list was dated December 29, 1960)?" Witness replied "yes" (T. 275). Another passenger list dated December 30, 1960, was also introduced and objected to. On this particular list a name "Rogers" appeared and the person "Rogers" was described as a female, but the Court again overruled the objection and admitted the list into evidence (T. 277).

After the Government concluded its case the Appellants moved for a judgment of acquittal on both counts (T. 296, 298). The trial judge stated: **"What I am interested in, is there any proof here about the knowledge of the forgery?"** (T. 296). The Court concluded that it would deny the motions (T. 297, 300). However, before denying the motions for judgments of acquittal the trial judge commented: **"I say that you have a very strong defense and almost a law defense, but not quite, in my opinion."**

The trial judge instructed the jury and they returned a verdict finding both Appellants guilty on the substantive crime and the crime of conspiracy. Appellants were

sentenced to serve five years on each count with the sentences to run consecutively.

QUESTIONS INVOLVED ON APPEAL

I

Whether or not the trial court committed reversible error in denying the Appellants' motions for judgment of acquittal on both counts where the evidence was insufficient to prove the allegations in the indictment.

II

Whether or not the trial court committed reversible error in admitting into evidence declarations of co-defendant ORIN F. ROGERS that were not uttered in furtherance of the conspiracy.

ARGUMENT

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR DENYING APPELLANTS' MOTIONS FOR JUDGMENT OF ACQUITTAL ON BOTH COUNTS WHERE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ALLEGATIONS IN THE INDICTMENT.

A. No proof of transportation of securities.

To sustain a conviction under Title 18, U.S.C., 2314, it is necessary to prove accused transported the securi-

ties in interstate or foreign commerce or caused the transportation to be done. Cf. **Johnson v. United States,** 207 F.2d 314, 319 (5th Cir. 1953); **Bartholomew v. United States,** 286 F.2d 779 (8th Cir. 1961).

The transportation according to the overt acts alleged in the indictment and in the bill of particulars occurred on December 28, 1960. To attempt to show that the Appellants travelled in foreign commerce on December 28, 1960, the Government introduced into evidence a passenger manifest of Flight No. 446, Miami to Nassau (T. 274). This passenger list contained the names "Rogers, O." and "Levine, G.", but was dated December 29, 1960 (T. 273, 275). It was introduced by an airline employee, who neither made up the list or received it. The introduction of the list was strenuously objected to (T. 270, 273, 276, 277). The trial judge overruled the objections on the ground that the date of December 29 was inserted on the list instead of December 28 because of a clerical error (T. 273, 277).

Appellants must wonder, if they had attempted to introduce into evidence a passenger manifest that they flew to New York, for example on December 28, 1960, whereas the list was dated Decemmber 29, 1960, whether the Court would have admitted their exhibit.

It is manifest that the Appellants were denied due process of law when the trial judge permitted into evidence a crucial exhibit which was allowed to be amended so it could conform to the allegations involving the element of transportation set forth in the indictment.

As to the testimony by Appellant ORIN F. ROGERS'

Secretary that Mr. Rogers told her George had been unduly worried when he came through customs with a package (T. 162), such testimony is clearly inadmissible because the alleged declarations of the co-defendant neither reasonably nor obviously has any tendency to aid the conspiracy. **Holsman v. United States,** 248 F. 193 (9th Cir. 1918); **Harrington v. United States,** 267 F. 97 (8th Cir. 1920); **Minner v. United States,** 57 F.2d 506 (10th Cir. 1932). At the worse, it is a mere admission by ORIN F. ROGERS **as to a past fact** which is not admissible against the co-defendant, GEORGE LEVINE. Accord, **Harrington v. United States,** 267 F. 97 (8th Cir. 1920).

Even by this extra judicial declaration, Appellant, ORIN F. ROGERS, could not be found guilty. The transportation of the bonds by Rogers in foreign commerce is of vital importance and constitutes the corpus delicti. This, being the corpus delecti, could not be presumed nor could it be established by an extra judicial declaration of ORIN F. ROGERS. See **Pines v. United States**, 123 F.2d 825, 829 (8th Cir. 1942).

B. No proof that Appellants had knowledge that bonds were counterfeit.

An integral part of the offense under Title 18, U.S.C., Section 2314, charged against the Appellants, is that the accused had knowledge the bonds were counterfeited. See **Barry v. United States,** 287 F.2d 340, 341 (D.C. Cir. 1960).

The dearth of evidence on the issue of knowledge is reflected in the trial judge's statement "what I am interested in, is there **any** proof here about the knowledge

of the forgery (sic)?" (T. 296). In denying the motions for judgment of acquittal, the trial judge, again concerned with the lack of evidence on the issue of knowledge, commented "I say that you have a **very strong defense** and almost a law defense ***." (T. 297). These statements of the trial judge should alert this Honorable Court to exercise the closest scrutiny in reviewing the record to determine if there was any evidence showing scienter on the part of the Appellants.

Knowledge of the securities being counterfeit is alleged in the substantive charge, and this is likewise true of the conspiracy charge wherein the conspiracy alleged was to violate provisions of the statute which require proof of such scienter. In other words there could be no unlawful conspiracy to cause to be transported counterfeit securities without knowledge that the securities were counterfeited.

It appears proper, at this time, to relate in some detail the testimony upon which the Government relies in their vain attempt to prove knowledge.

Assuming, for the sake of argument, that the Government has established that the Appellants transported the counterfeit bonds from Miami to Nassau, it does not follow, ipso facto, that they had knowledge that the bonds were counterfeit. It would be an incorrect principle of law to state a presumption or inference of scienter arises, when anyone transported and obtains cash for counterfeit securities. Not only is this an unreasonable inference, but, a fortiori, it certainly is not an inference which can be established beyond and to the exclusion of a reasonable doubt.

Even the fact, assuming it for the sake of argument, that the bonds were taken to Nassau is not even a suspicious circumstance, for, there was testimony by Mr. Henderson, a Government witness, that a higher borrowing margin on securities was allowed in Nassau than in the United States. (T. 35-37).

Of far greater importance, is the fact that both Appellants correctly identified themselves and did not assume fictitious names. Use of an assumed name on a forged security or in a transaction involving counterfeit securities tends to establish fraudulent purpose. **Kreuter v. United States**, 201 F.2d 33, 36 (10th Cir. 1952); **Herman v. United States**, 289 F.2d 362, 367 (5th Cir. 1961).

In Appellants view, the turning point in this Appeal is largely dependent upon whether the testimony of Appellant, ORIN ROGER'S secretary as to declarations he made to her, could be construed to show knowledge. She testified that Mr. Rogers told her "'I have to go over to Miami to get something. George didn't want to bring it into the Colony'" (T. 161), and he also told her at a later time that George had been unduly worried because when he came through customs, they didn't even look at the package (T. 162). These statements were objected to (T. 160) and were objected to again by means of a motion to strike (T. 286-291). However, again for the purpose of argument, let us assume the testimony concerning the declarations of Appellant, ORIN F. ROGERS, was admissible.

At best, the declarations constitute a slightly suspicious circumstance that some offense against the customs laws may have been committed. The declarations

are again suspicious circumstances pointing conceivable to some violation of the Bahamian customs laws, but the declarations do not point to knowledeg on the part of the Appellants that the bonds were counterfeit. **Forte v. United States**, 94 F.2d 236 (D.C. Cir. 1937).

It is obvious that the declarations are too equivocal or so susceptible to doubtful interpretations that no inferences of knowledge should be permitted to be drawn therefrom in order to establish the vital link. To do otherwise would constitute reversible error. Cf. **Parker v. United States**, 297 F.2d 135, 137 (5th Cir. 1961).

The inadmissibility of the two declarations will be covered in full in Point II, infra, and Appellants respectfully ask that the Court consider the subject matter stated under Point II as being applicable to this Point at this juncture, and as being incorporated as a part hereof by reference.

It is interesting to note that Mr. Henderson and Mr. Ross, both professional stock brokers, did not question the authenticity of the bonds (T. 219, 220). A reasonable inference could be drawn that the Appellants likewise thought the bonds to be bona fide.

The Government failed to prove its case on the vital element of knowledge. It offered no evidence to prove that Appellants had any knowledge of the character of the securities. **Johnson v. United States**, 207 F.2d 314, 319 (5th Cir. 1953); Cf. **Franken v. United States**, 248 F.2d 789, 791 (4th Cir. 1957); **Helms v. United States**, 310 F.2d 236 (5th Cir. 1962).

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING INTO EVIDENCE DECLARATIONS OF CO-DEFENDANT ORIN F. ROGERS THAT WERE NOT UTTERED IN FURTHERANCE OF A CONSPIRACY.

The extra-judicial declarations of Appellant, ORIN F. ROGERS, not stated in the presence of Appellant, GEORGE LEVINE, were as follows:

1. "I have to go over to Miami to get something. George didn't want to bring it into the colony." (T. 161).

2. He (ORIN F. ROGERS) said that George had been unduly worried, because when he came through customs whatever package he had that was in his hand, they didn't even bother to look (T. 162).

These statements were objected to (T. 160) and objected to again by means of a motion to strike (T. 286-291).

Without proof of the existence of a conspiracy, the declarations of an alleged co-conspirator should never be admitted. This is because extra judicial declarations of a co-conspirator are not, without more, sufficient to establish the existence of the conspiracy. **Panci v. United States**, 256 F.2d 308 (5th Cir.); **Montford v. United States**, 200 F.2d 759 (5th Cir.).

Taking all the evidence, except the declarations, there is absolutely no proof of transportation of any package. Further with or without the declarations there is no proof that Appellants had any knowledge that the securities were counterfeit. Thus the Government is attempting to prove a conspiracy solely on declarations of an alleged con-conspirator stated in the absence of another alleged co-conspirator (LEVINE), which is contrary to law.

Another legal ground for reversing the trial court for admitting the declarations into evidence is that the declarations of the co-defendant (ROGERS) did not relate to the conspiracy and were not uttered in furtherance of the conspiracy. It is fundamental that a declaration which reasonably or obviously has no tendency to aid the conspiracy is not admissible. **Holsman v. United States**, 248 F. 193 (9th Cir. 1918); **Harrington v. United States**, 267 F. 97 (8th Cir. 1920); **Minner v. United States**, 57 F.2d 506 (10th Cir. 1932).

The declaration that George didn't want to bring "something" into the colony can hardly be considered as a statement obviously tending to aid the conspiracy.

The other statement that George had been unduly worried because customs didn't even bother him cannot by any semantic gymnastics be considered a declaration obviously tending to aid the conspiracy. Furthermore it should never have been admitted because it relates to a past fact, stated out of the presence of the co-defendant, GEORGE LEVINE. Accord, **Harrington v. United States**, 267 F. 97 (8th Cir. 1920).

The admission by the Court of either statement was

highly prejudicial to both defendantt and especially prejudicial to GEORGE LEVINE, who wasn't even present when the alleged declarations were uttered.

At stated in Point I, supra, at best, the declarations could be considered suspicious circumstances pointing conceivably to some violation of the Bahamian Customs Laws, but the declarations do not point to knowledge on the part of the Appellants that the bonds were counterfeit. **Forte v. United States**, 94 F. 2d 236 (D. C. Cir. 1937).

With great respect to the United States prosecutors, it is obvious that they have failed to prove their case, and they cannot be permitted to prove their case by using incompetent hearsay evidence about "getting something past customs".

CONCLUSION

The Judgments and Sentences appealed from should be reversed and remanded, with directions for the entry of judgment of acquittal as to each charge.

Respectfully submitted,

MANNERS AND AMOON
Attorneys for Appellants
25 West Flagler Street
Suite 406
Miami, Florida 33130

By: /s/ Jos. P. Manners

JOS. P. MANNERS

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellants was mailed to the United States Attorney, In and For the Southern District of Florida, Main Post Office Building, Miami, Florida, this ____ day of _____, 1963.

By: /s/ Jos. P. Manners
Of Counsel

APPENDIX E

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 20495

ORIN F. ROGERS and
GEORGE LEVINE,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ORDER APPROVING SUBSTITUTION OF COUNSEL

On motion of counsel for the appellant, GEORGE LEVINE, in the above styled cause, and the Court being fully advised in the premises, it is

ORDERED AND ADJUDGED that the firm of Manners and Amoon, of 25 West Flagler Street, Suite 406, Miami, Florida 33130, be, and they are hereby given leave to withdraw as counsel for the appellant, GEORGE LEVINE, and that the firm of Lurie & Capuano, of 1409 Biscayne Building, Miami, Florida 33130, are hereby given leave to enter their appearance as counsel for the appellant.

DONE AND ORDERED in Chambers this ____ day of November, 1964.

/s/ Elbert P. Tuttle
JUDGE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

(Original Filed November 10, 1964)

APPENDIX F

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 20495

GEORGE LEVINE

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from November 9, 1964 the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from November 9, 1964 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon

the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from November 9, 1964 unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Elbert P. Tuttle
United States Circuit Judge.

(Original Filed November 10, 1964)

Dated:

APPENDIX G

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code Annotated, Section 2314
Transportation of stolen goods, securities, monies, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely

making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. June 25, 1948, c. 645, 62 Stat. 806, amended May 24, 1949, c. 139, § 45, 63 Stat. 96.

Title 18, United States Code Annotated, Section 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $20,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 28, United States Code Annotated, Section 753, paragraph (b)

One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court.

APPENDIX H

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1963

No. 20495

D. C. Docket No. 400-62-CR-EC
ORIN F. ROGERS and GEORGE LEVINE
Appellants,

versus

UNITED STATES OF AMERICA
Appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before TUTTLE, Chief Judge, BROWN, Circuit Judge, and BREWSTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

July 13, 1964

Issued as Mandate: Nov. 16 1964 (as to Orin F. Rogers)

APPENDIX I

[639] - Tuttle

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 20,495

ORIN F. ROGERS and GEORGE LEVINE,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

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(November 2, 1964)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, BROWN, Circuit Judge, and BREWSTER, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 743

GEORGE LEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on July 13, 1964 (Pet. 52). A petition for rehearing was denied on November 2, 1964 (Pet. 14). The petition for a writ of certiorari was not filed until December 7, 1964, and is therefore out of time under Rule 22(2), Rules of this Court. Although on November 10, 1964, the court of appeals stayed its mandate as to petitioner for a period of 30 days from November 9, 1964 (Pet. 47–48), the stay had no effect upon the running of the time for filing a petition for a writ of certiorari. Cf. *Boylan* v. *United States,* 257 U.S. 614.

Untimeliness aside, the present case raises no issue meriting review by this Court. In the court of

759-506—64

appeals, petitioner contended that the evidence was insufficient to sustain his conviction for unlawful transportation of counterfeited securities in foreign commerce (18 U.S.C. 2314 (Supp. IV)) and for conspiracy to violate that statute (18 U.S.C. 371), and that evidence of two statements made by the petitioner's co-defendant was improperly admitted against petitioner under the co-conspirator exception to the hearsay rule. As to the first point, the court of appeals held that there was ample evidence from which the jury could find that counterfeited bonds had been transported by the petitioner in violation of the statute, and its opinion correctly summarizes the evidence which supports its decision (Pet. 9–12). The court of appeals did not reach the second question presented by petitioner since it held that the first of the two statements in issue was admissible on other grounds and that "no proper objection was made to the reception of" the second statement at the trial (Pet. 13; see Tr. 162). Petitioner does not seriously challenge either holding.

The main thrust of the petition is that this Court should reach an issue which was presented for the first time in a petition for rehearing in the court of appeals, and disposed of without hearing or opinion. Petitioner contends that during the course of argument to the district court on his motion for judgment of acquittal, an attorney for the government made a statement which was irrelevant and allegedly prejudicial—a statement with respect to petitioner's being under other charges. No objection appears to have been taken to the statement at trial (Tr. 297), so

that the petitioner would have been precluded from raising the issue on appeal had he attempted properly to do so. In any event, although 28 U.S. 753 provides for recording all proceedings in open court in criminal cases, the failure to record mere argument of counsel in the absence of a jury is obviously far removed from the failure to record argument of counsel to a jury, the situation in *Fowler* v. *United States*, 310 F. 2d 66 (C.A. 5). There is no basis for assuming prejudice to the petitioner, and neither the record nor the affidavit which accompanied the petition for rehearing below (Pet. 22–24) provides any such basis. To the contrary, although the district court did express the view that the motion for judgment of acquittal presented a close question (Tr. 297), it is clear that the record contained sufficient evidence to sustain a guilty verdict, as subsequently held by the court of appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 743

GEORGE LEVINE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF AN ORDER DENYING PETITION FOR WRIT OF CERTIORARI

NICHOLAS J. CAPUANO of
LURIE & CAPUANO
1409 Biscayne Building
Miami, Florida 33130
Attorneys for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 743

GEORGE LEVINE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF AN ORDER DENYING PETITION FOR WRIT OF CERTIORARI

PETITION FOR REHEARING

Your petitioner, George Levine, respectfully requests this court to grant a rehearing of the Petition for a Writ of Certiorari herein on the following grounds.

Your petitioner respectfully suggests the Court in denying the Petitioner's motion to waive timeliness failed to consider all of the aspects of his motion as follows:

1. That on November 2, 1964, the Petition for Rehearing filed in behalf of your petitioner in the United States Court of Appeals for the Fifth Circuit was denied.

2. After moving for a stay of mandate and requesting a certified record to be provided your petitioner. On November 19, 1964, your petitioner through his counsel received a certified record that was incomplete. A letter was written to the clerk of said court advising him of the condition of the record, which also stated that December 9 was the deadline for filing the Petition for Writ of Certiorari with this court.

3. On November 30, 1964, after various phone calls, counsel for your petitioner forwarded to the clerk of the United States Court of Appeals for the Fifth Circuit his copy of the transcript to be used in making up the certified record. This letter also referred to December 9 as the time for filing Petition for Writ of Certiorari with the clerk of this court.

4. The clerk of the United States Court of Appeals for the Fifth Circuit never questioned December 9, 1964, as being the filing date for the Petition for Writ of Certiorari and never attempted to correct counsel for your petitioner, this is shown by the letter of December 1, 1964, from the Clerk of the United States Court of Appeals for the Fifth Circuit to the Clerk of this court and attached to your petitioner's original petition to waive timeliness.

5. That the wording of the order staying the mandate entered by the United States Court of Appeals for the Fifth Circuit is so written that your petitioner and his counsel were of the opinion that December 9, 1964, was the correct filing date for the Petition for Writ of Certiorari with this court.

That the matters and things argued in the Petition for Writ of Certiorari exhibit a clear violation of the consti-

tutional rights of your petitioner, that the government in its reply did not deny the existence, of the facts, and the truth thereof. That such statements as set forth deprived your petitioner from consideration of his cause by a fair and impartial judge and is the type of error that this court should investigate. That this court has a wide discretion in the matter of timeliness and that this is an instance where timeliness should be waived.

Wherefore your petitioner respectfully requests that this court grant your petitioner a rehearing in this cause.

Respectfully submitted,

NICHOLAS J. SAPUANO
Attorney for Petitioner
19 West Flagler Street
Miami, Florida

STATE OF FLORIDA)
COUNTY OF DADE) ss.

NICHOLAS J. CAPUANO, being first duly sworn, deposes and says: That he is of counsel for the petitioner in the above entitled cause and that he has this ..... day of ....., 1965, mailed a true copy of the foregoing Petition for Rehearing to the following: ARCHIBALD COX, Solicitor General of the United States, Washington, D. C. That this Petition is in good faith and not for delay and is restricted to the grounds stated herein.

Sworn to and subscribed

before me this ..... day

of ....., 1965.

Notary Public, State of Florida

My Commission expires: